No. 94-2062

Supreme Court, U.S.
F I L E D
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CLERK

In The

Supreme Court of the United States

October Term, 1994

CITY OF NATIONAL CITY AND TERRY HART, individually and as Chief of Police,

Petitioners,

vs.

SAMUEL W. RATTRAY, JR.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Plaintiff in a defamation action brought by a police officer must disprove the Defendant's defense of truth by "clear and convincing evidence."

PARTIES INVOLVED

Petitioners are the City of National City and Terry Hart, individually and as Chief of Police.

Respondent, Samuel W. Rattray, Jr., is an individual.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Involved	ii
Table of Contents	iii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Summary of the Argument	4
Reasons for Denying the Writ	5
I. There Is No Conflict of Authority Between the Ninth and Second Circuits on Whether Respondent Must Disprove Petitioners' Defense of Truth With Convincing Clarity	5
II. There Is No Compelling Policy to Support the Review of This Issue by the Supreme Court	7
III. This Would in Any Event Be an Innappropriate Test Case in Which to Enunciate Expanded First Amendment Protection	8

Contents

Page

Conclusion 9

TABLE OF CITATIONS

Cases Cited:

Buckley v. Littell, 539 F. 2d 882 (2d Cir. 1976) 5, 6

Goldwater v. Ginsburg, 414 F. 2d 324 (2d Cir. 1969) 5

Herbert v. Lando, 73 F.R.D. 387 (S.D.N.Y. 1977), 568 F.2d 974 (2d Cir. 1977), 441 U.S. 153 (1979) 6

New York Times v. Sullivan, 376 U.S. 254 (1964) 7

Sharon v. Times, 609 F. Supp. 1291 6

Statutes Cited:

28 U.S.C. § 1254(1) 2

California Penal Code § 632 ..... 2, 3

United States Constitution Cited:

First Amendment 2, 8

Other Authority Cited:

5 Witkin, *Summary of California Law* (9th ed. 1988) § 494, p. 583 7

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TO THE HONORABLE SUPREME COURT:

The Respondent, Samuel W. Rattray, Jr., respectfully requests this Court deny the Petition for Writ of Certiorari submitted by Petitioners, City of National City and Terry Hart.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 51 F.3d 793 (9th Cir. 1995).

STATEMENT OF JURISDICTION

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners invoke the First Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

The facts of this case, as submitted with Samuel Rattray's appeal of judgment entered for the Petitioners were essentially as follows.

Samuel Rattray was the only black Police Officer in the City of National City, California, and was terminated shortly after a flirtatious conversation between he and a white administrative officer had been taped. The taping occurred because her husband had complained about other similar conversations, even though she stated that she was not bothered or concerned about those conversations. (7-24-90 R.T. I- 186, 207-208; 7-27-90 IV-173; 7-31-90 V-147; 7-26-90 R.T. III- 129-131; 7-27-90 R.T. IV- 115). The taping occurred without his knowledge, in violation of California Penal Code § 632, which prohibits the taping of a confidential communication unless all parties to the communication consent. He was thereafter interrogated about what happened during the conversation, and directly accused of making sexually provocative statements, which he denied. During the interrogation, despite repeated requests, Rattray was refused an opportunity to hear the tape. (7-25-90 R.T. II- 37-42); 7-25-90 R.T. II- 48-49).

He was thereafter terminated for lying. He lost his grievance appeal of the decision, where the Chief of Police provided him with only a transcript of the tape. At trial, the original tape was played, revealing that important segments had been omitted from the transcript, *i.e.*, portions in which Mr. Rattray expressly and convincingly renounced any romantic intentions. (7-25-90 R.T. II- 73-81, Exh. 8-A, 12).

In a private conversation with Mr. Rattray, Chief Hart stated that if Mr. Rattray made no complaints, he would rehire him. This is a tactic which Chief Hart used with another employee, who appeared to testify in this matter. (7-25-90 R.T. II- 93-94; 7-26-90 R.T. III- 88-92).

When Chief Hart did not rehire him, Mr. Rattray filed a complaint with the Equal Employment Opportunity Commission. At that point Chief Hart held an interview with the National City Newspaper reporter, stating that he had clear and convincing evidence that Mr. Rattray had done something wrong, and had lied about it, and that Mr. Rattray's lie was of sufficient magnitude that he could no longer be trusted as an officer. Those statements were reported. (7-25-90 R.T. II-99-100; 7-25-90 R.T. II- 100-101; 7-25-90 R.T. II- 101-102, Exhibit 14 attached to Excerpt of Record).

The case was tried on July 24, 1990. The District Court dismissed Mr. Rattray's claim for invasion of privacy under Penal Code § 632, ruling that Police Officers and their agents, even while not investigating a crime, were exempt from the application of that law. The jury thereafter deliberated on the claims of Race Discrimination and Defamation, and while holding for the Petitioners on the Discrimination claim, held against them on the defamation claim, and awarded $300,000. (12-14-87 R.T. 5:16-23; 8-3-90 R.T. VIII-5:16; 6:3; 8-3-90 R.T. VIII-2:3-4:17).

The District Court thereafter granted Petitioners' motion for new trial because of an alleged "dearth" of evidence to support the defamation claim. (11-26-90, R.T. 12:2-3; 6:6-11; 7:1-11). The case went to trial for the second time on April 14, 1992, where the District Court instructed the jury panel on the laws associated with Defamation before the hearing of any evidence. Included in these instructions was the statement that Mr. Rattray would have to *disprove* the truth of Chief Hart's statements by clear and convincing evidence. At that point Respondent stipulated to a judgement for the Petitioners, and preserved all his appellate issues. The Court of Appeals for the Ninth Circuit reversed the judgement, holding it was error to dismiss the claim for invasion of privacy, and error to so instruct the jury on the burden of proof in a defamation claim. (4-14-92, R.T. 53-55; 145; 150-153; 4-15-92, R.T. 5-6, 35-36, 39; 5-11-92 C.T. 116).

SUMMARY OF THE ARGUMENT

The Ninth Circuit opinion in this case is not in conflict with the prevailing view in other circuits, and not, as Petitioner contends, in conflict with the view in the Second Circuit.

The same opinion is more consistent with Supreme Court holdings covering the burden of proof in a public figure case, and moreover, avoids the confusion of two separate doctrine, *i.e.*, privilege and truth.

This is a poor set of facts to address this particular issue because it would utilize an unjust anomaly by which to state and illustrate a constitutional principle.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT OF AUTHORITY BETWEEN THE NINTH AND SECOND CIRCUITS ON WHETHER RESPONDENT MUST DISPROVE PETITIONERS' DEFENSE OF TRUTH WITH CONVINCING CLARITY.

Petitioners allege that the holdings of the Ninth and Second Circuits are in conflict, *i.e.*, that the holding in this case is in conflict with precedent set in the Second Circuit case of *Buckley v. Littell*, 539 F. 2d 882 (2d Cir. 1976). This is an important contention for the Petitioners to substantiate because it strengthens the need for Supreme Court intervention. A closer look at the Second Circuit authority cited by Petitioners, however, reveals that their position is more a legal "slight of hand" than a true statement of the Second Circuit's holdings.

The opinion of the Ninth Circuit accurately identifies the case of *Goldwater v. Ginsburg*, 414 F. 2d 324, 341 (2d Cir. 1969) as the only precedent directly addressing the issue of the burden applicable to the actual truth of a defamatory statement, and accurately notes that its holding repudiates the notion that plaintiff need to prove the falsity of a defamatory statement by clear and convincing evidence. (Petitioners' Appendix A at pp. 8a, 24a, 25a).

Petitioners' claim that the case of *Buckley v. Littell, supra,* has, since, *Goldwater,* directly resolved the issue in the Second Circuit with a contradictory outcome, and, in an attempt to lend credibility to this claim, cite other District Court cases within Second Circuit, alleging that these had used *Buckley* as the controlling precedent in directly resolving the same issue.

Petitioners thus contend that the Ninth Circuit is simply mistaken about the position of the Second Circuit, a contention which even the dissenting opinion does not make.

It is important in weighing this contention to note that the *Buckley* case never directly addressed as an appellate issue whether falsity must be proven by clear and convincing evidence. In other words, the actual truth of the defamatory publications was not an issue before the court in *Buckley* and, therefore, its opinion could not constitute an authoritative holding of that court. It was rather an inaccurate over-generalization made about the law on an issue which was of no consequence to it in making its decision.

Similarly, Petitioners place undue importance on other cases within the Second Circuit which purport to use *Buckley* as controlling authority for their decisions. An examination of those cases reveal no support for that conclusion. The case of *Sharon v. Time,* 609 F. Supp. 1291, 1295 does not use *Buckley* as authority to dispose of any disputed appellate issue, and to the contrary, distinguishes *Buckley* in the resolution of proof standards associated with the affirmative defense of "Substantial Truth," holding that the preponderance test was applicable. The only other case cited within that District was *Herbert v. Lando,* 73 F.R.D. 387 (S.D.N.Y. 1977), 568 F.2d 974 (2nd Cir. 1977), 441 U.S. 153 (1979) which Petitioners acknowledge was decided on grounds wholly unrelated to the defamation claim.

After reading the cases cited by the Petitioners, this Court can only arrive at a conclusion which is opposite to that which they recommend, *i.e.,* that the opinion in this case reinforces harmony rather than conflict between the Circuits.

II.

THERE IS NO COMPELLING POLICY TO SUPPORT THE REVIEW OF THIS ISSUE BY THE SUPREME COURT.

Typically qualified privilege issues are addressed with reference to the state of mind of the person invoking the privilege, the essential doctrine being something to the effect that the abuse of a privilege results in its loss. This was the approach of the Supreme Court in the case of *New York Times v. Sullivan*, 376 U.S. 254, 285-286 (1964), whose holding, for purposes of this case, was that actual malice alone will disown the holder of his privilege. *New York Times v. Sullivan,* 376 U.S. 254, 285-286 (1964).

Somewhat out of line with this reasoning is a separate and independent defense available in California and in common law, *i.e.,* the defense of truth. 5 Witkin, *Summary of California Law* (9th ed. 1988) § 494, p. 583. This defense essentially holds that an individual who maliciously defames another, actually believing that his own defamatory statement is false, can be spared liability if it turns out by a freak accident, or otherwise, that the statement he believed false was actually true. Petitioners are asking that the Supreme Court undertake to extend protections which were, under *New York Times, supra,* focused only upon the defamer's state of mind, outward into a common law defense which has nothing to do with how the defamer thinks or feels.

If there is a "place" where constitutional protections are appropriately focused, it is on some aspect of the act over which the prospective defamer has control, *i.e.,* the motives and knowledge supporting the act. Thus if there is concern over whether the exercise of free speech would be chilled, the Supreme Court should attend to standards of proof associated

with malice. As the majority opinion of the Ninth Circuit noted in this case, the victim's disproof of the truth of defamatory statements made against him place him in the awkward and onerous position of having to prove a negative, a position which could frequently frustrate a just and/or legitimate claim, while providing little in the way of deserved comfort to potential defamers.

III.

THIS WOULD IN ANY EVENT BE AN INAPPROPRIATE TEST CASE IN WHICH TO ENUNCIATE EXPANDED FIRST AMENDMENT PROTECTION.

The cruel irony of this case is that a major public figure is invoking a privilege to comment on a minor unknown public official. National City Police Chief Hart is successfully claiming constitutional protections in his use of the news media as a cudgel to punish a beat level officer for filing his claim of discrimination. The only reason why Respondent is subject to any burden to prove actual malice at all is the fact that he was a police officer, and that there are holdings at the circuit level to the effect that any police officer, regardless of his position, is a public official for the purpose of applying the New York Times standard.

The unfairness of this situation challenges both common and uncommon notions of fundamental fairness, yet Petitioners want this case to serve as a landmark to jurisdictions across the nation of how the United States Supreme Court feels about the protections associated with the first amendment.

Thus even if these were issues that the Supreme Court should address, this would be a bad case in which to address those issues.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a writ of certiorari should be denied.

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Respectfully submitted,

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